No. 2941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE QUICKSILVER MINING COMPANY
(a corporation),

Defendant and Plaintiff in Error,

vs.

C. P. ANDERSON,

Plaintiff and Defendant in Error.

Brief on Behalf of Defendant in Error.

B. A. HERRINGTON,
Attorney for Defendant in Error.

Filed this_____day of May, 1917.

FRANK D. MONCKTON, Clerk.

By_____Deputy Clerk.

Press of V. S. HILLIS, 34 S. Second St., San Jose

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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

We shall endeavor to picture the characters and the property surrounding this litigation more fully than has been done in the opening brief.

The Quicksilver Mining Company was incorporated in the State of New York, by legislative enactment on April 10th, 1866. (261*).

(**Number in parenthesis indicates page of transcript unless otherwise indicated.*)

The by-laws of the corporation provide for eleven directors. At all times the office of the company was in the City of New York. The stockholders met there annually upon the 3rd Wednesday in June. (263, 265). The directors were to meet at the New York office monthly. (212).

The property owned and operated by this corporation is commonly called the New Almaden Quicksilver Mine. This was not only a mining property, but consisted of vast acreage of agricultural lands approximating in all 8500 acres. (214, 104, 235-237). The Company had operated upon this property for the production of quicksilver extensively for many years.

The property is about twelve miles south westerly from the City of San Jose. A boulevard known as the Almaden Road connects the property with this City. (55, 56). The company's stores, buildings and reduction works are located at the terminus of this Almaden Road. About four miles westerly and in the vicinity of the McAbee Road, the Company was taking out ore upon their property at what was known as the "Senator Shaft." (66).

The property lies upon the eastern foothills of what is known as the Coast Range, and back of this is found the water shed of Los Alamedes, commonly called Almaden Creek. (55). This creek "had its source above this property and ran through the property about three miles in length" (119). "There was

a section of a dam 122 feet high that could maintain a flow of approximately 10,000,000 gallons a day. Some of the water from this creek was being utilized through a pipe line by the County for road sprinkling. The pipe line was approximately eleven miles in length." (119).

C. P. Anderson, defendant in error, before engaging with plaintiff in error, was in the real estate business between four and five years, and was familiar with land values in that section. Had "lived there for many years," and "knew every section of the country" and was "well acquainted with the people in that neighborhood." (54).

CHARLES A. NONES, a resident of New York City, was elected President of the Company in June, 1909, and continued in office from term to term until June, 1913.

An office was maintained in New York City by Nones; the office force consisted of "an office boy" and a Miss Margaret A. Bowe, who was a stenographer or "operator on the typewriter", and was also a director and secretary of the mining company. (210-240).

C. A. Nones made frequent trips to the Company's property at New Almaden in Santa Clara County, and remained different periods of time.

J. F. Tatham was book-keeper for the Company at the mine, where he became acquainted with Charles A. Nones in February 1910. At that time Charles

A. Nones—then president of the Company—appointed Tatham "General manager", and fixed his salary. He continued general manager until June 1913. His place of business was always in Santa Clara County. He "took orders with reference to the operation of the property from Nones." He was elected *a director and treasurer* of the Company in June 1911 and remained such until June 1913. (113-114, 240.)

D. M. Burnett Esq. an attorney at law of San Jose, California, was the local attorney for the company during the regime of Nones. He was elected a director in June 1912 and served until June 1913. (251).

THE CAUSE.

When C. A. Nones became President, and visited the property, the great commercial value, to the mining company, of its water rights for power purposes and for irrigating the rich Santa Clara Valley orchard lands was recognized by him. In connection with the power proposition he concluded that an electric railroad from the mine to San Jose was not only advantageous but that it was a necessity to the Company. I use his language: "The railroad was a necessity" * * "I went out to California and I believed it was a necessity to the Company." (191).

In the first instance, in April, 1910, Mr. Burnett, the attorney for the Company, sent for Mr. Anderson, introduced him to Mr. Nones, who was known by Mr. Anderson to be the President of the Company.

Mr. Nones and Mr. Burnett explained what was wanted with reference to "tying up the properties" that would be effected in securing complete control of water rights and power rights along Los Alamedos Creek. Options were to be obtained for the purpose of securing control of the water in the canyon above the Company's property.

Mr. Anderson accepted the offer made him. He was to be well paid when the work was done. He agreed to drop everything and start upon the work at once. There was something in the neighborhood of sixteen sections or 10,000 acres of land to be covered. (54).

Mr. Anderson entered upon this undertaking about April, 1910, and performed all the services required of him. He was to receive a reasonable value for his services. Nones informed him that he would see that Anderson was paid at least $2500 for these services. (82).

(It is unnecessary to here discuss the services rendered or their value for the reason, that in open Court, during the trial; when defendant in error was prepared to prove all the services and their value, plaintiff in error admitted that the services were fully performed, and their value was as prayed for in the complaint, and that the amount of $411.00 in money had been expended by defendant in error in these enterprises; and that if defendant in error was

entitled to recover he is entitled to recover the whole amount sued for.)

In the Spring of 1911 Mr. Nones engaged Mr. Anderson's services in the preliminary work for a proposed electric railroad from San Jose to New Almaden, also a branch line to the "Senator Shaft" heretofore mentioned. (63). Mr. Nones said that "he depended entirely upon Mr. Anderson to produce the rights of way" and franchises, and the Quicksilver Mining Company would pay for the services. (66). Mr. Anderson entered upon these services and "the entire line was completed so far as the rights of way and franchises were concerned." (81). This was in March, 1912, and at that time Nones agreed that the services were reasonably worth $4500.

In addition to this work, Mr. Anderson paid out the sum of $411.00 in connection with these services. To collect for the reasonable value of the services described and for the amount of the outlay, Mr. Anderson instituted this action.

The defendant in error abandoned all defenses save and except the claim that Nones was not authorized, expressly or impliedly, to employ Anderson; that the Company never ratified or approved Anderson's employment; and that the enterprises were *ultra vires.*

WITNESSES.

The trial Court heard the testimony of C. P. Anderson and J. F. Tatham; also the testimony of one A. L. Brassy, who was the owner of one share of stock and a director of the Power Company which was a subsidiary corporation of the mining company. Also witnesses Charles Herrmann, the civil engineer who surveyed the right of way for the proposed electric railroad; and Emory E. Smith, of the firm of Smith, Emory & Company, Chemical Engineers, Structural Engineers and Civil Engineers, who surveyed, mapped and platted a proposed dam and dam site with reference to the proposed power and water plant, and who analyzed the mining company's minerals—after the quicksilver had been extracted—for the purpose of determining the value of the same for paint purposes.

The other evidence offered at the trial of the cause consisted of depositions and the exhibits attached thereto. These depositions were taken on behalf of the mining company, plaintiff in error, in New York City, and were the depositions of C. A. Nones, Margaret A. Bowe and two others, stockholders, directors or officers of the mining company.

We desire to direct the Court's attention to the assertions emphatically made by counsel for plaintiff in error, that "Anderson produced Nones as a witness in his favor," and that therefore Anderson "vouched for him in Court." (Opening Brief of

Plaintiff in Error, pages 28, 53-57). An erroneous impression may be gained by the Court from this declaration. The deposition of C. A. Nones was taken in New York City by plaintiff in error, and not by C. P. Anderson (150), as was the case with all other depositions that were offered in evidence. The direct examination of C. A. Nones was conducted by Mr. Harby, acting as the Attorney for the Quicksilver Mining Company in New York City. At the commencement of the taking of his deposition we were represented by Mr. Marshall of New York City. Before the commencement of the cross-examination Mr. Marshall retired suggesting that his firm had been of counsel for The Quicksilver Mining Company in some matters and he therefore considered it improper for him to conduct the cross-examination of the witness. We have no hesitancy in saying now, since the remarks of counsel in the present brief, which were not made before the trial Court, that it is very evident from the original deposition that the withdrawal of Mr. Marshall would have been unnecessary had Mr. Nones testified with truth and frankness. We secured the services of Blandy, Mooney & Shipman, and it was through the very capable cross examination of a very able lawyer that Mr. Nones was finally compelled to divulge the truth; and fortunately, Mr. Blandy was greatly aided by the fact that before Mr. Nones gave his testimony he had declared in writing in the bankruptcy Court, that which was contrary to

what he had testified to in his direct examination. There is a marked conflict found in the testimony given by Nones himself. Nones was an unfriendly witness to defendant in error; and it may be clear upon reading the entire deposition of Nones that the excerpts quoted therefrom by counsel for plaintiff in error are directly contradicted in other portions of his testimony. It is true that upon the opening of the case at the time of the trial, all of the depositions taken in New York were presented in evidence by defendant in error, as were also all of the many and lengthy exhibits which accompanied the depositions.

This calls our attention to another subject discussed by Counsel for plaintiff in error which might mislead, unless attention is called to it. In the preparation of the transcript there was included at the suggestion of counsel for plaintiff in error, much discussion had between the Court and the attorneys at the time of the hearing. Counsel in his brief takes up the remarks of the Court for the purpose of indicating the Court's mind at the time of the trial. (7, 8, 9).

The original depositions consisting of 125 full typewritten pages, many extensive exhibits, including articles of incorporation, by-laws, printed annual reports and minutes of the mining corporation covering a period of several years were all offered in evidence, but none of them were then read. The testimony that was taken in Court was transcribed; the case was submitted on briefs. The remarks of the

Court, concerning the evidence at the time of the trial were made with full knowledge of but a small portion of the evidence. This fact was so stated by the Court, and will be found in the following language: "*Whether or not that has been proven* I am not prepared to pass upon *because I do not know all the proof.*" (75-76). "It (the evidence) will be considered by the Court only in the event that other evidence proves the existence of the agency as claimed by the plaintiff—it can be admitted." (79).

In view of this state of facts, we suggest that counsel's claim with regard to the testimony of Nones is untenable, and that it was for the trial Court to determine where the truth lay. It was for the trial court to determine the conflict of evidence; and upon the trial Court's determination of conflicting evidence the decision was in favor of defendant in error. In addition to this, we suggest that any construction made by the Court at the time of the trial based upon the evidence, only a small portion of which had then been heard, is not to be considered as against the construction of the testimony and evidence when completely examined, and construed as expressed by the opinion.

AUTHORIZATION, EXPRESS OR IMPLIED.

That the president of plaintiff in error had authority to employ defendant in error for the performance of the work which was done cannot be doubted.

Nones was the president of the Company and Tat-

ham was its treasurer and general manager. They, with D. M. Burnett, were the only representatives of the company in this State. No business involving the properties of the company could be transacted, so far as the public were concerned, with any other persons or person than Nones and Tatham. The parties in question had complete charge of the business of plaintiff in error. Some of the directors lived in New York and the meetings of the Board of Directors were held there, but, so far as defendant in error was concerned, the directors in question may just as well have lived at the North Pole and have held their meetings there. The defendant in error did not know them or any of them. He could not consult or inquire of them, and if persons performing work for the Company in California, or selling its goods in that State, could do such business with its president or its California Manager only at their peril, and were obliged to make inquiries of the board of directors, if they wished to be certain of binding the company, the plaintiff in error's business could not have been carried on. The president and the general manager of the plaintiff in error were not only its authorized and legal agents in the State of California, but were in law and in fact the Company itself.

The trial Court in the opinion uses the following language:

"There is no doubt but that plaintiff was employed by Nones, *the apparent supreme directive head of*

the destinies of the corporation, to perform certain services for and in behalf of the corporation; neither is there any doubt but that such employment was had with the knowledge, acquiescence and active participation in all things attending it of Tatham, Nones' treasurer, general manager and codirector." (46-47)

The question of authorization express or implied, requires an examination of the proof upon three subjects; Nones—the president—and his apparent general powers; the relation of the Company with the water problem; and the relation of the Company with the railroad problem.

NONES.

That C. A. Nones was the "apparent supreme directive head" of the mining company there can be no doubt. This is true not only as to the State of California, but also as to the New York Office.

It is but necessary for us to look to the officers of the company and from this we will know that the stockholders had made C. A. Nones in effect the entire Board of Directors. His stenographer, Miss Margaret A. Bowe, was a director and secretary. His appointee, J. F. Tatham, was general manager and treasurer; the California attorney engaged by him, D. M. Burnett, was a director, and each and all of them were subject to his dictation and obeyed his orders.

The Board of Directors met but seldom, and only when he met with them. He dictated the minutes

and controlled the funds in the treasury. Miss Bowe's testimony taken upon the behalf of plaintiff in error, and offered in evidence with all other depositions by defendant in error, is upon this question in part as follows:

"When I was secretary from June 1910 to June 1913 the head of the office was the president, Mr. Nones. (210). The minute book of the Quicksilver Mining Company commencing on page 302 is in my handwriting. (210-211).

"Mr. Nones prepared the minutes; *he would dictate to me what to write in the book,* unless something special came up that I would take." (211).

"I believe I heard the matter of the construction of an electric road to connect San Jose with the mine discussed by Mr. Nones with the other directors of the Company. (212).

"Mr. Nones had been in California. *He was one time four months away so there would not be any minutes.* * * *". The notices went out regularly whether there was a quorum or not. (212). Mr. Nones had charge of the office. There should be meetings of the Board of Directors every month. At the meetings Mr. Nones would report what had been done concerning the business affairs of the Company, and the things which had been accomplished would be discussed with the directors. The minutes would state whether Mr. Nones' transactions were approved. *I cannot remember any disapproval of any of his executive acts as president."* (213).

Excerpts from the testimony of J. F. Tatham upon the question of Nones' complete dominion over the company show the following:

Upon Tatham's first meeting Nones in California, Nones made him general manager and fixed his salary. In June, 1911, Tatham was elected a director and treasurer though a resident of California. (113) He "never attended a directors' meeting of the Board of Directors of the Quicksilver Mining Company." (120).

"Q. Who had supervision and control of the property during that period? (While Nones was President)

"A. C. A. Nones, the president.

"Q. Did he take orders from any one?

"A. No. (114)

"Q. To cut a long story short you acted solely in all these matters upon the verbal order of Mr. Nones?

"A. Verbal and written. (122).

"Q. When Mr. Nones would come out here he would draw money?

"A. Yes sir.

"Q. That is in various amounts?

"A. Yes sir.

"Q. Did he give you a receipt or voucher for the money so drawn?

"A. No sir." (124)

The learned counsel for plaintiff in error criticizes the opinion of the Court touching the question of the

apparent unlimited power given Nones by the stockholders and Board of Directors over the long period of his administration as president of the Company.

In view of this we present an admission made by counsel directly contrary to this criticism and quote from page 124 of the transcript:

"Mr. Jarman.—What we desire to show, if your Honor please, is something that is familiar to counsel and to the witness and to myself; it is that Mr. Tatham as treasurer of the company paid out the corporation funds upon the say so of Mr. Nones absolutely; Mr. Nones would go into the safe and take out $500, or $1,000 or $1500 or $1,800 and it would be charged to the New York office; there would be no entries made in the Company's books and it would be put on a tag or on an envelope; at the end of the year Mr. Tatham would enter a lump sum, for instance, one year it was $9,176 and some cents. Some weight seems to be attached by counsel to the fact that Mr. Anderson was led into this matter somewhat by the fact that Mr. Tatham was a director of the defendant. Now, I have shown that Mr. Tatham never attended any meetings in New York. I desire now for the purpose of clearing up this matter of showing just the manner in which Mr. Nones handled the funds of The Quicksilver Mining Company; in other words, the treasurer of the Company not only paid its funds for the purpose of organizing other corporations for the purpose of exercising its corporate

powers, but that the Treasurer likewise used its corporate funds for any purpose that Nones directed him to use them."

"The Court.—Doubtless Mr. Herrington will stipulate that those were the facts."

"Mr. Herrington.—I will stipulate that what you state is correct: I think it is the truth."

The Minute Book of The Quicksilver Mining Company was an exhibit accompanying the depositions from New York, and was before the Court at the time of the trial, and was in the custody of the Clerk of the District Court. At the time of the preparation of the transcript this exhibit, the minute book, could not be found, nor has it since been discovered, so far as I am personally advised. If it should be discovered, it is agreed by stipulation that the original book may be examined.

Excerpts from the minute book were in the possession of the plaintiff in error at the time of the preparation of the transcript, and they will be found on pages 231-256 of the transcript.

From this record we may be able to gather an idea of the indifference of the Board of Directors with regard to their regular meetings. During the incumbency of Nones several months at a time elapsed, and upon one occasion nearly six months elapsed, without a meeting of the Board of Directors.

Annual reports in printed form were made to the stockholders by Tatham as general manager and

treasurer, and by Nones as president. These annual reports are exhibits and by stipulation are subject to examination. These reports show the matters stated by counsel for plaintiff in error quoted above. The fact that the sum of $9176 was charged in one year to the New York Office in a lump sum, and the fact that other similar lump sums were charged in other years to the New York Office because Nones would go to the safe and take out money at will, as stated by counsel, did not trouble the stockholders, or cause them to deprive him of his power and dominion over the money, property and affairs of the company during this long period of his incumbency.

They approved or acquiesced in his manner of handling the affairs of the Company and did not remove him until June, 1913.

THE POWER COMPANY.

The position of its property gave the mining company practically control over the Almaden Creek. This unquestionably was and is a very valuable asset to the Company. This fact was known to Nones, as president. The water and power was required for the mine and any surplus was salable. The power was further valuable for the operation of the contemplated electric railroad which was determined by the president to be a necessity. Other properties along the creek and above the mining company's property were required. Anderson undertook to procure these properties. The original power corpora-

tion was not satisfactory and a new one was formed, denominated Senonac Power Company. "Nones said that the stock of the Senonac Power Company was the property of The Quicksilver Mining Company." The stockholders were Nones, Tatham, D. M. Burnett, Anderson and Brassy. Each possessed one share issued upon the 21st day of March, 1912, and these shares were endorsed on the back in blank. Four thousand nine hundred and ninety-five (4995) shares were issued to The Quicksilver Mining Company March 22nd, 1912. (60-61). This makes a total number of 5000 shares, the number provided for in the articles of incorporation.

"A deed was executed by The Quicksilver Mining Company to the Senonac Power Company with reference to the company's water rights. The deed was in the possession of Mr. D. M. Burnett, the attorney for the mining company." (62).

The Quicksilver Mining Company was to pay Mr. Anderson for the money laid out by him in this matter. He was paid $60.00 expense money while working on water options. (82).

Mr. Alfred H. Swayne gave his deposition on behalf of plaintiff in error. He is a New York lawyer. He was a director of The Quicksilver Mining Company from June 1909 until about January, 1915. To the following questions he returned the following answers:

"Q. You also heard discussed in directors' meet-

ings the development of the water rights and water powers *owned by the Company?* A. Yes.

"Q. And the object and purpose in the development of the company's water rights and water power was to enable the company both to use its power to greater advantage and to sell power, wasn't it?

"A. That was the plan." (142).

At a meeting of the Board of Directors in New York City held on June 5th, 1911, the following proceedings were had:

"On motion of Mr. Swayne duly seconded by Mr. Whicher, the President was authorized to have Mr. Aaron, the Company's counsel, prepare a Resolution re. California Power Company, to be submitted to the Directors at the next meeting." (238).

At a meeting of the Board of Directors in New York City September 20th, 1911, the following occurred:

"The President then read a report on Water conditions "(see page 339)", and on motion of Mr. Whicher, duly seconded, it was resolved that the officers of the company be authorized to transfer to the California Power Company all the water rights owned by the Quicksilver Mining Company, together with a lease of the pipes of the county of Santa Clara, said lease being for a term of fifty (50) years and in exchange therefor to receive all stock and other securities of the California Power Co." (242).

Excerpts from the report of C. A. Nones presented to the Board of Directors in New York City upon this

day conclusively and absolutely show that this entire water and power enterprise was the enterprise of plaintiff in error.

"Owing to the contract which we have with the county, it entitled us to lease all pipes for a term of 50 years from date we elect to lease same, subject to a donation of 100,000 gallons of water per day to the county. I recommend that as soon as these pipes are properly installed that this company notify the county of its intention to lease said pipes and this company should then transfer to the water company which is now in existence all of the water rights receiving in payment therefor all the stock of the water company. * * *" 243).

"We have adverse possession to 3,000,000 gallons water per days, and although we could not supply this amount during the dry season without building another dam, we nevertheless can supply between 1,300,000 gallons and 1,700,000 gallons water per day." (244).

At the same meeting of the Board of Directors in New York City the following proceedings were had:

"On motion of Mr. Whicher, duly seconded, and approved, the following motion was ratified that—

The President is therefore authorized to sell and transfer these securities at a price of not less than One Hundred and Fifty Thousand Dollars ($150,-000.00) in cash or its equivalent, reserving however, to The Quicksilver Mining Company the right for

all power to carry on its business now and in the future and for not less than 200,000 gallons of water per day." (245).

At the meeting of the Board of Directors on March 18th, 1912, the following proceedings were had.

"Resolved that the officers of the company be authorized to transfer to Senonac Power Company, all the water rights owned by the Quicksilver Mining Company, together with a lease of the pipes of the county of Santa Clara. Said lease being for a term of fifty (50) years, and in exchange therefor to receive all stock and other securities of the Senonac Power Company, and the President is therefore authorized to sell and transfer these securities at a price of not less than Two Hundred Thousand Dollars ($200,000.00) in cash or its equivalent, reserving, however, to the Quicksilver Mining Company, the right for all power to carry on its business now and in the future, and for not less than 200,000 gallons of water per day." (249).

In harmony with the above resolution, a deed was executed by The Quicksilver Mining Company conveying the water rights mention to the Senonac Power Company. (63).

As a matter of fact, these valuable water rights which passed into the Senonac Power Company, all of the stock of which corporation was held and owned by plaintiff in error, was about to be sold for a large sum of money. "A deposit of $1000 was up on

a sale of the water. The total purchase price was around $325,000; the sale was being negotiated by Smith, Emory & Company. The sale was never consummated. The deposit was returned." (116). This prospective sale was reported to stockholders and directors about Dec. 31, 1911, by Nones. (259; also 146).

At all times plaintiff in error was the owner of these water rights. When plaintiff in error took over the stock of the Senonac Power Company it received the benefits of all of the services and expenditures of Mr. Anderson. Had this sale been consummated we apprehend that counsel for plaintiff in error would not have proclaimed that his client had not received the benefits of Mr. Anderson's labor.

Smith, Emory & Company made maps and plans and surveyed for a proposed dam for this power company. (132). For their services they were paid by The Quicksilver Mining Company.

A certificate of stock of the Senonac Power Company was issued to a Mr. Landers in January, 1914. Mr. Landers was at that time, and for many years afterwards, manager of The Quicksilver Mining Company at New Almaden. The stock was issued to him for the purpose of disincorporating. (62).

A deed was executed by the Senonac Power Company reconveying to The Quicksilver Mining Company all the rights that the power company had previously acquired from the mining company. (62).

In view of the foregoing facts of record, we assert that it requires some boldness on the part of counsel for plaintiff in error, when he criticizes the trial court for finding that this water project was the project of plaintiff in error; and that Mr. Anderson was "justified in considering that ample authority for his employment was lodged in the directive head there upon the ground."

One of learned counsel's clients in this action is not in harmony with his position. Alfred H. Swayne, a New York lawyer, and a director of the Company after the Nones administration, makes the following admission: "that Company (Senonac Power Company) *was merely a subsidiary of The Quicksilver Mining Company.*" (147).

THE RAILROAD COMPANY.

After Mr. Anderson had spent about a year upon the power proposition, Mr. Nones took up the proposed electric railroad with him; and stated at the first interview "that better transportation was absolutely necessary for the mines. That the company expected to put up a paying plant there and that the ore had to be more cheaply moved than it could be under the present system of hauling." (63).

Along the Almaden Road between San Jose and the mines is a thickly settled fruit producing country. It was suggested by Nones that a meeting of property owners be held at the school house in the

vicinity, for the purpose of getting their assistance in securing rights of way and franchises over and adjacent to the Almaden Road for the distance of twelve miles from San Jose to the Mine.

Mr. Nones attended the meeting, had Mr. Tatham, the manager of the mine there, and upon this occasion set forth his plans and said "that The Quicksilver Mining Company needed better transportation and he supposed that the rest of them did, and that he contemplated building an electric line, and he said there would be no stock sold, that The Quicksilver Mining Company would pay for the building of the road and would take all the stock." (64-65).

A committee of citizens of this vicinity was appointed. Mr. Nones asked that the Committee "try and produce a right of way free gratis from San Jose to New Almaden." It was found afterwards that this was impossible as a great many people preferred donating money rather than to give a right of way and have the cars running in front of their houses. (65). Mr. Nones depended entirely upon Mr. Anderson to produce the rights of way and the franchises and stated to him that The Quicksilver Mining Company would pay for his services, and wanted him to be very particular about getting everything correct. (65-66). Mr. Anderson immediately undertook this work and continued upon it and completed it in the early summer of 1912. At the beginnig of August the preliminary survey was made. It took some three or four

months to locate the line. Mr. Anderson was working continuously. (67).

Mr. Anderson went out every day with Mr. Herrmann, the surveyor and Civil Engineer. Mr. Herrmann was working under Mr. Anderson's instructions. (67).

Upon Sept. 6th, 1911, Mr. Nones communicated with Mr. Schuman, Chairman of the Committee which was assisting in procuring the rights of way and in collecting a bonus for the proposed company. Counsel for plaintiff in error places much stress upupon the fact that Mr. Nones merely signed his name personally and used the pronoun "I" throughout the letter. It was known throughout this entire community that Mr. Nones was the president of The Quicksilver Mining Company; it was known that the railroad project was the project of The Quicksilver Mining Company, and had been so announced to the Committee and at the first meeting of citizens when this committee was formed; thatthere would be no stock sold, and that The Quicksilver Mining Company would pay for the building of the road. Nones had no business in California other than the business of being president of The Quicksilver Mining Company.

Through the efforts of Mr. Anderson the McAbee private Road was declared to be a public road by the Board of Supervisors of Santa Clara County, and a franchise to run the proposed electric road over the McAbee Road was procured. This was simply a

branch line through a sparsely settled territory leading to what is known as the "Senator Shaft", and was *beneficial to no one except The Quicksilver Mining Company.* Mr. D. M. Burnett, the attorney for The Quicksilver Mining Company performed all of the legal services. (72).

The railroad company known as the San Jose & Almaden Railroad Company was incorporated. The original stockholders were C. P. Anderson, J. F. Tatham, manager of the mining company, D. M. Burnett, attorney for the mining company, and C. A. Nones, the president of the mining company. (At no time was A. L. Brassy a stockholder or officer of the Railroad corporation. Counsel for plaintiff in error has in his brief made an erroneous statement to the contrary.) The certificates of stock were issued on October 20th, 1911, one share to Anderson, Tatham and Burnett, each of which have endorsements in blank on the back thereof by the respective parties to whom they were issued. The certificate of C. A. Nones was for 117 shares. It bore no endorsement upon the back. It was produced in Court by counsel for plaintiff in error, who stated that he received it from Mr. Burnett who was the attorney for The Quicksilver Mining Company and also attorney for the railroad company. (73).

It may be noted at this time that the name of D. M. Burnett appears with that of A. H. Jarman as one of the attorneys for The Quicksilver Mining Company in the present litigation. (12, 17).

It was understood and stated by Mr. Nones that all of this stock of the San Jose & Almaden Railroad Company was being issued for the benefit of The Quicksilver Mining Company. (72, 79). Various sums of money were expended from time to time by The Quicksilver Mining Company in meeting the preliminary costs and expenses, in paying for surveys, rights of way, cutting down grades and the expenses of incorporating the railroad company.

$650.00 were sent out from New York at one time and $1350.00 at another time to Mr. Anderson. (70). Mr. D. M. Burnett was president and Mr. J. F. Tatham was treasurer of the railroad company. This money received by Mr. Anderson was turned over to Mr. Tatham and was paid out by him for rights of way. (79). $1200 was furnished by The Quicksilver Mining Company and paid over to the treasurer of the railroad company. A portion of this money was used in securing the second franchise from the Board of Supervisors, for advertising etc. The balance was returned to The Quicksilver Mining Company and endorsed upon the books as a loan. (80).

In the month of March, 1912, Mr. Anderson's work was completed. All of the rights of way and franchises had been secured and the road had been completely surveyed. At this time, with Mr. Burnett, Mr. Nones and Mr. Tatham,—the president—the general manager and the attorney for The Quicksilver Mining Company; the only officers and

directors of The Quicksilver Mining Company upon the Pacific Coast; in the office of Mr. Burnett, Mr. Anderson was handed an instrument in Mr. Tatham's handwriting and signed by Mr. Nones, which is as follows:

"New Almaden, Cal., March 5th, 1912.

"C. P. Anderson, Esq.,
San Jose, Cal.

Dear Sir:

For services rendered and to be rendered on the line of San Jose & Almaden R. R., I hereby agree to pay you the sum of forty-five hundred ($4500) dollars, payable on completion of the road.

Yours truly,
CHARLES A. NONES."

(81-83).

At the time Mr. Anderson was handed this written instrument Mr. Nones made a statement to Mr. Anderson in Burnett's office that he had bought the rails, ties and fish plates and that the road would be completed in 90 days. (83).

From the testimony of Mr. Tatham, the general manager and treasurer of The Quicksilver Mining Company, we find the following:

"I was vice president and treasurer of the San Jose & New Almaden Railroad Company. The stock of this railroad company belonged to The Quicksilver Mining Company.

"About $5,000 was expended for the promotion of the preliminary work of this railroad company. The money paid out belonged to The Quicksilver Mining Company. I paid it out. A portion of it came from the office at New Almaden and a portion came from the New York office. $3,000 I think came from New York and $2,000 from the office at the mine. A little work was done cutting down a bluff to the entrance of the Hacienda. It was done by The Quicksilver Mining Company and paid for by it. Surveys were made and paid for by the Mining Company. Abstracts were also secured, amounting to $225. The survey cost in the neighborhood of $500. These bills were paid for by the mining company." (114-115).

"When the stock was issued Mr. Nones, the president of The Quicksilver Mining Company said that the stock that was issued to Nones was held in trust for The Quicksilver Mining Company." (120).

A great number of different sums for different purposes paid by The Quicksilver Mining Company were entered upon the books of the mining company.

On The Quicksilver Mining Company's cash book were entries public to every stockholder and every director; entries which must have been accompanied and been a part of the annual reports which were printed and forwarded to the individual stockholders in New York City.

Among some of these different entries are the following:

On page 137 of the cash book of The Quicksilver Mining Company of date November 2, 1911, paid $400.00 for the railroad company. (122).

November 27th, 1911, $50.00 charged to the railroad company. (122).

December 28th, 1911, page 141, month's expenditures $2073.24. This amount charged to the railroad company on the books of the mining company included the $2000 of The Quicksilver Mining Company which had been sent out from New York to Mr. Anderson and had been turned over by him to Mr. Tatham. (122-3).

Jan. 10, 1912, page 145, to close pay roll $152.16. Feb. 1912, $263.15. March, 1912, $793.75. April, 1912, $66.13. June, 1912, $150.00. August, 1912, $25.00. Sept. 1912, $160.00. Oct. 1912, $208.50. Dec. 1912, $280.20.

~~1912, $280.20.~~ These payments were for wages for laborers in cutting down grades along the line of the railroad, which moneys were paid out by The Quicksilver Mining Company. (123).

Mr. Charles Herrmann, the surveyor and civil engineer, surveyed the right of way for the railroad. His services were paid for by The Quicksilver Mining Company. He was paid by check drawn by The Quicksilver Mining Company. The first payment was $200 in September, 1911. On March 22nd, 1912, he received the mining company's check for $292.50;

on October 7th, 1912, he received the mining company's check for $72.00. (136).

These checks did not aggregate the full amount of Mr. Herrmann's bill; $407.50 was still due him. This amount was paid him after Mr. Nones and Mr. Tatham and Mr. Burnett ceased to be directors or officers of the plaintiff in error. The final payment to Mr. Herrmann for surveying the proposed railroad line was made by the forwarding of The Quicksilver Mining Company's check from the New York Office to Mr. Herrmann January 14th, 1914. (134-5-6).

Mr. Anderson's complaint in this action wherein he seeks to recover for his services and for moneys paid out by him, was filed on the 21st day of February, 1914. (10). It will be noted that while it has been necessary for him to resort to suit, nevertheless, the new administration of The Quicksilver Mining Company paid Mr. Herrmann the balance for his services during the month preceding.

In the testimony of Mr. Alfred H. Swayne taken in New York by plaintiff in error, to the following questions he returned the following answers:

"Q. Referring to page 346 of the minute-book, Defendant's Ex. 1 for identification, is it not the fact that the Board of Directors approved the action of the president of the company in this expenditure of some $3,000 upon a right of way, surveys and cutting down grades for the San Jose and Almaden

Railroad, the stock of which was to be owned by The Quicksilver Mining Company isn't that a fact? A. Yes.

Q. And at that meeting was there not a further resolution that the action of the president be approved in receiving the stock of the San Jose and Almaden road for the account of The Quicksilver Mining Company, the defendant in this action, for the full amount of expenses incurred? A. Yes." (143).

Long prior to this action taken by the Board of Directors, the president had submitted to the Board an extended report upon the railroad from which we quote in full as follows:

"The President then read a paper regarding an Electric Road to be built as follows (see page 342), and on motion of Mr. Whicher and seconded, it was resolved that before taking action on an electric road to be built from San Jose to the mine, that the President furnish a complete specification showing itemized costs, possible earnings, etc., to be submitted at a future meeting of the Board. Mr. O'Brien stated that he knew a competent engineer who could furnish such a report, and he was requested to engage same.

"Our maximum transportation tonnage has a daily capacity of not in excess of 20 tons, which we haul 7½ miles at a cost of 60 2/10 cts, per ton. For this service we were paying last year $1.25 per ton, and

this saving has been effected by ownership of our teams. All of which has been paid for.

"In the near future, we will have to consider the handling of not less than 60 tons daily and possibly 100 tons. We have reduced the cost of transportation as low as can be done so that an increased tonnage will force us to purchase additional teams, and will permit of no saving. Our calculations of hauling is based on 6 horses for every 8 tons.

"Only hauling 60 tons daily would cost us about $37.00 or about $12,000 per year. In addition to this amount, we are constantly paying for the hauling of our groceries from San Jose to the mine, and we haul about 25 tons monthly, at a cost of about $4.00 per ton. Our entire hauling charges and feed bills amount to about $15,000 per year.

"I submit the proposition to the Board regarding an Electric Road to be built from San Jose to the Furnaces. There have been several meetings on this matter with the residents of the Valley, who are unanimously in favor of this undertaking, and have so far subscribed in cash about $10,000. This being a donation for which they will receive neither stock nor bonds of the proposed road. I believe that this donation will amount to $15,000 before the road is built.

"Besides there has been granted to me personally, for about ¾ of the distance of a private right of way of 20 ft. width, and also sufficient land for turnouts

and stations. The balance of the right of way necessary will have to be acquired from the county and will cost a few hundred dollars.

"I am of the opinion that if a company were formed to operate and build this line that the line could be built by a certain contractor with whom I have talked in San Jose, upon the following terms:

"Original cost of road would not exceed $110,000, to which would be added 10% for profit, and for this the contractor would receive 6% bonds of this Railroad Co., less amount of cash donated by residents. Said bonds to be guaranteed principal and interest by the Quicksilver Mining Co.

"The cost of hauling our own freight over this line this way would be very small. A 40-ton car as a trailer could be attached to any regular passenger car without further charge, and in addition to our saving for transportation, which will be in the neighborhood of over $15,000 per year, we would also be able to carry passengers, haul freight and express packages for residents along the line.

"A close calculation of the population between San Jose and Almaden gauging the same for a distance of a mile east and west along the proposed line shows about 5000 people also three schools with a daily attendance of 150 scholars.

"Also beg to call your attention to the benefits accruing to us from this electric road. Our acreage along the proposed lines is composed mostly of hills

which are nothing but grazing lands and worth not over $20 per acre. Should this line be built these hills would be desirable building sites, we retaining our mineral rights, as has been the case in similar localities, to wit, Los Gatos and Saratoga, two places which are situated from 6 to 7 miles of our property.

"We also own 128 acres of land along the proposed line which we could not sell for $48 per acre for agricultural purposes last year. This land is finely situated for a townsite, and although we have sold 10 acres at $110 per acre, we still have sufficient left to warrant setting out this land in ½ acres plots which could be sold easily at $150 per ½ acre plot.

"This proposition is worthy of the most serious consideration. I have devoted several months to it, and have obtained the approval of the majority of the property owners whose lands are along the proposed line of railway.

(Personally signed)
CHAS. A. NONES,
President." (245-248).

In addition to the foregoing report, the annual printed report of the president and treasurer covering a period from April 30th, 1911, to and including December 31st, 1911, which report was made to all the stockholders and directors, in so far as it concerned the railroad enterprise, is as follows, to wit:

"We were prevented from making a larger production for the eight months covered by this report

on account of the lack of transportation facilities. This I expect to overcome as this Company has within the last few months obtained the necessary rights of way and franchises for an electric line to be owned entirely by your Company and which will extend from San Jose to the town of New Almaden, where the furnaces are located. By this means we will be able to save considerable cost in our transportation and at the same time it will be possible for us to increase our hauling facilities, thereby also increasing our production. This proposed line will also transport passengers and express matter for the adjacent territory.

"Another benefit arising from the construction of this line will be the opening up of our lands, most of which can be developed and sold at a far higher price than would be obtained were this road not in operation." (258-259).

As a further reason for the advantage and necessity of this proposed electric railroad, the following concerning the manufacture and transportation of paint was contained in the same report.

"I also wish to advise you that your directors have authorized the building of a paint mill with a capacity of 20 tons per day. This mill will be one of the by-product divisions of your Company, for the use of waste after the quicksilver has been thoroughly extracted therefrom and mixed with some ingredients under a certain process will make as good, if not a

better, metallic paint than can be found on the market at present. This company will be able to manufacture this paint at a very low cost and at the present market prices will be able to make large profits." (259).

Chemists had already analyzed the refuse or by-product from the quicksilver mine which had accumulated for years, and had reported the same to be very valuable for the manufacture of a metallic paint which could be produced in immense quantities and at a large profit. (240-241).

At the meeting of the Board of Directors on September 20th, 1911, concerning this paint proposition, the following proceedings were had:

"—and on motion of Mr. Swayne, seconded by Mr. Whicher, the president was authorized to expend not more than $8000 for the erection of the paint mill, and to take such steps as might be necessary, under the advice of our counsel, for the formation of a company to conduct such business with the understanding that all of stock is the property of the Quicksilver Mining Company. Motion carried." (241).

It will be noted that another subsidiary corporation was contemplated with the understanding that all of the stock was to be the property of The Quicksilver Mining Company.

In the event of the construction of the electric railroad the increase in the value of the company's realty holdings was a mater of great consequence to the

Company; and the transportation of its goods and wares for its Almaden Stores was another subject for consideration in the matter of benefit and economy.

The testimony of C. A. Nones is dwelt upon considerably by counsel and we desire to discuss this briefly.

As heretofore stated, his deposition was taken in New York by plaintiff in error. We have no hesitancy in saying that an examination of his deposition shows a very pronounced effort on his part to avoid the truth, thereby favoring to The Quicksilver Mining Company. He swore that he never made any contract with Mr. Anderson concerning water rights. The facts of record and other evidence conclusively show to the contrary, as was found by the trial Court. He testified that he had procured Mr. Anderson to secure options for the right of way for the railroad for himself, personally, and not for the Company. The trial Court found to the contrary, and the finding is conclusively supported by the record; and before the cross-examination of Nones was completed, he was forced to contradict himself.

Nones had been forced into involuntary bankruptcy before this deposition was taken. At the time of giving his deposition he had forgotten what he had placed in his schedule concerning the Anderson liability. When he was confronted with this record he was compelled to admit that the services were per-

formed for The Quicksilver Mining Company. His schedule in bankruptcy on this obligation is as follows:

"Names of Creditors: *C. P. Anderson.*

Residences: *San Jose, California.*

When and Where Contracted: *San Jose, California, January, 1911.*

Nature and Consideration of Debt and Whether Any Judgment, Bond, Bill of Exchange, Promissory Note, etc., and Whether Contract as Partner or Joint Contractor With Any Other Person; and if so, With Whom: *Guarantee of Payment for Work Done for Quicksilver Mining Company.*

Amount: *$4,500.*" . . (231).

When confronted with this schedule on cross-examination by our representative, Mr. Blandy, the witness Nones to the following questions returned the following answers:

"Q. Whose debt were you guaranteeing him?

"A. The Quicksilver Company, who were the owners of the majority stock, all the stock of the railroad company. (202).

"Q. Now, Mr. Nones, in your schedule in bankruptcy, to which you have referred, you will find that under oath you stated that you were indebted to Mr. Anderson for $4,500 on a guaranty for work done by him for The Quicksilver Mining Company; is that a true statement?

"A. That is correct, yes, decidedly, decidedly." (203).

Again, the very last question and answer of his entire deposition are as follows:

"Q. And you guaranteed him that $4,500 for his services for The Quicksilver Company?

"A. I did." (210).

The unlimited powers which Nones was permitted by the directors and stockholders to exercise, were in themselves ample to warrant any reasonably prudent man in concluding that he had authority to obligate the corporation for all services rendered by Mr. Anderson.

The conduct of all the officers of the corporation who were in California, the conduct of the Board of Directors and the stockholders as to each of the proposed enterprises, would and did warrant the same conclusion.

When all of these facts are combined—viz—the apparent unlimited authority and power of Nones over the business and property of the corporation—all the facts touching the relationship of the corporation with the water rights and the power proposition—and also with the railroad proposition—authorization, either express or implied, due to intention, acquiescence, holding out, or negligence, must be the conclusion—in fact—in law—and in justice.

RATIFICATION.

The facts establishing authorization are so interlaced with the facts establishing ratification, that it seems advisable to continue with and conclude with reference to the evidence upon both these subjects. While the facts already stated as appear from the record conclusively show authorization and ratification, there was in addition to these, an intentional and deliberate ratification in two distinct instances on the part of the stockholders.

At the annual meeting of the stockholders in New York on June 21st, 1911, the minutes of the meeting show the folowing:

" * * * on motion of Mr. Hollinger, seconded by Mr. Velsor, all acts of the officers and directors of the Quicksilver Mining Company during the past year, were ratified and confirmed." (239)

At the succeeding annual meeting of the stockholders in New York on June 19, 1912, the record shows:

"On motion all acts of the officers and directors of the Quicksilver Co. during the past year were ratified and confirmed." (251).

It may be claimed by counsel for plaintiff in error that the majority of the stockholders were not present at the first meeting. This may or may not be true. The record shows that 41,619 votes were cast when the votes for directors were counted. Any stockholders absent at this time were absent of their own voli-

tion, as this was the regular annual stockholders' meeting.

At the next annual meeting 60,309 votes were cast, being over sixty per cent of all of the capital stock.

Plaintiff in error is estopped from denying this deliberate intentional ratification, and the ratification is binding; and a contention that a ratification is not binding unless all the material facts for ratification are in the possession of the party ratifying, does not apply in this case. This principle does not apply where there is an intentional and deliberate ratification, nor does it apply where the circumstances are such as reasonably to put the principal upon inquiry. This doctrine is squarely decided in BALLARD vs. NYE, 138 Cal. 598; also MECHEM on AGENCY, Sec. 148.

Speaking of the general rule that a party must have full knowledge of all of the material facts before the doctrine of ratification can be applied, the learned Justice in Ballard vs. Nye, page 598, uses the following language:

"*Ignorance of such facts,* however, *can avail nothing where it is intentional and deliberate, or* where the circumstances are such as reasonably to put the principal upon inquiry." (Mechem on Agency, sec. 148). This rule is intended to protect the vigilant, not to aid those, who, advised by the situation and surroundings that an inquiry should be made, make none; and ignorance of the existence of facts which

might have been ascertained with ordinary diligence, is no protection. Where the situation naturally and reasonably suggests that some inquiry or investigation should be made, and none is made, the person failing to make it will be deemed in law possessed of such facts as the inquiry would have disclosed."

"It is well settled that the president or other general officer of a corporation has power prima facie to do any act which the directors or trustees of the corporation could authorize or ratify."

SUN PRINTING & PUBLISHING ASSN. VS. MOORE, 183 U. S. 642, 651.

"In this case the president, having full personal charge of the business which the defendant was organized to transact, represented the corporation, and prima facie had power to do any act which the directors could authorize or ratify."

OAKES VS. CATTARAUGAS WATER CO., 143 N. Y. 431, 436.

"When, therefore, the defendant admitted, on the trial of the case in hand, that Quinn was its president and superintendent and general managing agent, this was sufficient evidence of his authority to make the contract with the plaintiff, and *it was not necessary for the plaintiff to show any vote or other corporate act* constituting him the agent of the corporation. It would not be in accordance with justice or the interests of society to allow corporations to deny the au-

thority of such agents, or to repudiate contracts made by them for work and labor from which they derived benefit."

CROWLEY VS. GENESEE MINING CO., 55 Cal. 273, 276.

In the case just quoted from the president of the defendant employed the plaintiff to work in a quartz mine belonging to the defendant, for the purpose of taking out rock and delivering it for crushing by the company at its mill, the plaintiff, as compensation for his services, to receive one half of the gross amount of the proceeds of each crushing, and the action was to recover the amount claimed by plaintiff to be due him under such contract.

Where one is financial manager of a corporation, his acts bind the company, and it cannot repudiate its liability therefor, by showing that he had in fact no authority.

CASE MFG. CO. VS. SOXMAN, 138 U. S. 431.

If the president of the corporation had authority to see to the doing of the work for which he made the employment, such fact gave him authority to engage the employee to do the work.

HENDERSON BRIDGE CO. VS. McGRATH, 134 U. S. 260, 274.

The presumption is that the president of the corporation was authorized to employ Mr. Anderson.

IN SUN PRINTING & PUBLISHING ASSN. vs. MOORE, 183 U. S. 642, 648, 651, the MANAGING EDITOR of a newspaper signed a contract on behalf of the corporation owning the newspaper for the chartering of a yacht for the purpose of collecting news concerning events connected with hostilities between the United States and Spain; the contract calling for a voyage by the vessel to Cuban waters, the vessel to be used as a dispatch boat for the purpose of gathering news, and the contract binding the newspaper company to return the yacht at the expiration of the term of hiring. While the yacht was engaged in the service in question, it was wrecked and became a total loss. The action was brought by the owner of the yacht to recover its value, the action being based upon the contract for the safe return of the yacht. Speaking of the power of the managing editor to make the contract, the court said: "The evidence establishes he exercised an unlimited discretionary authority in the collection of news for the Sun, making all pecuniary and other arrangements in respect thereto. Prior to the hiring of the Kanapaha he had, solely on his volition, hired vessels for the use of the Sun for periods of a week at a time. By whom he was vested with this authority does not appear with certainty, but in the absence of direct evidence we are authorized to presume that the authority was conferred, either directly or indirectly, by the trustees of

the association, in whom was lodged the power to manage the concerns of the company. * * * * Persons acting publicly as officers of the corporation are to be presumed rightful in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are affirmative proofs of the latter. * * * * If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose; and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."

In Pittsburgh C. & St. L. R. Co. vs. Keokuk & H. Bridge Co., 131 U. S. 371, it was said: "When a contract is made by any agent of a corporation in its behalf and for a purpose authorized by its charter, and the corporation receives the benefit of the contract without an objection, it may be presumed to have authorized or ratified the contract of its agent."

LOUISVILLE N. A. & C. R. CO. VS. LOUISVILLE TRUST CO., 174 U. S. 573-574.

The authority of an officer of a corporation may be by parole and collected from circumstances. It may be inferred from the general manner in which, *for a period sufficiently long to establish a settled course of business, he has been allowed, without interference*

to conduct the affairs of the corporation. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. *Directors cannot, in justice to those dealt with, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business,* and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect officers and make declarations of dividends. That which they ought, by proper diligence, to have known, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.

MARTIN VS. WEBB, 110 U. S. 7, 14-15.

Where the president of a corporation is permitted to exercise full power and authority in the conduct and management of its business, and deals with the property and affairs of the corporation in such a manner and for such a length of time as to justify others with whom he transacts business in believing that he had authority to do the acts in the manner he does, such third persons have a right to deal with him on the presumption that he has such authority, and the corporation having knowledge of such acts, and of the manner in which the corporate business is transacted, cannot thereafter, to the injury and pre-

judice of such parties, deny his authority or disaffirm his acts.

G. V. B. MINING CO. VS. FIRST NATIONAL (9th Cir.) 36 C. C. A. 634, 639-640, 95 Fed. 23.

"A corporation which suffers appearances to exist, and its officers and agents to so act, as to give one employed by such officers and agents reason to believe that he is so employed by the Company, becomes liable to such person as his employee to pay for the services rendered."

COWLEY vs. GENESEE MINING CO., 55 Cal. 273, 276-277.

HENDERSON vs. WESTERN GAS MACHINE CO., 8 Cal. App. 249.

"We think the rule to be well settled that the president and general manager of a going business concern may, by the custom and usage of the corporation, be invested with power to do a variety of things necessary to be done by some particular officer or agent in the usual and ordinary course of business."

SPERLAZZO vs. OLIPHANT, 24 Cal. App. at 83-84.

"When, in the usual course of business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to repre-

sent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business."

STOKES vs. NEW JERSEY POTTERY CO. 46 N. J. L. 237, 242.

"Corporations, as much as individuals are bound to good faith and fair dealing and the rule is well settled that they cannot by acts, representations, or silence, involve others in onerous engagements, and then turn around and disavow said acts and defeat just expectations, which their conduct has superinduced.

HACKETT vs. OTTAWA, 99 U. S. 86, 96.

CHICAGO R. I. & P. R. CO. vs. HOWARD, 7 Wall. 392, 413.

"The most that can be claimed is that the contract, as executed, was in excess of the power conferred by the board of directors upon the president; that it varied from the authority given him. In this respect the transaction does not differ from that of an agent of an individual who has exceeded his authority. That which a principal may authorize an agent to perform he may ratify when performed by the latter without authority. When, with full knowledge of all the facts involved a principal reaps the fruits of the unauthorized contract of his agent and for sometime yields acquiescence to its provisions, he will be

deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter. And this doctrine applies to corporations equally with individuals."

GRIBBLE vs. COLUMBUS BREWING CO., 100 Cal. 71-72.

NEWHALL vs. JOSEPH LEVY BAG CO., 19 Cal. App. 25-26.

GOODWIN vs. CENTRAL BROADWAY BLDG. CO., 21 Cal. App. 377.

It is not necessary that the authority of Nones and Tatham should appear by the minutes of the corporation.

"The technical doctrine that a corporation could not contract, except under its seal, or, in other words, could not make a promise, even if it had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of the institution, all parole contracts made by its authorized agents are express promises of the corporation;

and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie."

BANK OF COLUMBIA vs. PATTERSON ADMR. 7 *CRANCH,* 299, 306.

"Whatever doubt may once have existed on the point it is now settled beyond controversy that a corporation may be bound by the acts of its duly authorized agents in the same way that a natural person may be bound, and that a formal resolution is not necessary to establish an act *which can only be performed by a board or committee acting as a body.* (*Danforth v. Schokarie & D. Turnpike Road,* 12 Johns. 227; *Dunn v. Rector, etc., of St. Andrew's Church,* 14 Johns. 118; *Bank of Columbia v. Patterson's Administrator,* 7 Cranch, 299; *Bank of the United States v. Dandridge,* 12 Wheat, 64; *Corinne Mill, Canal & Stock Co., v. Toponce,* 152 U. S. 405; *Curtis v. Leavitt,* 15 N. Y. 1, 48; *Hooker v. Eagle Bank of Rochester,* 30 N. Y. 83; *Farmers' Loan & Trust Co. v. Housatonic R. R. Co.,* 152 N. Y. 251; *Hall v. Herter Bros.,* 90 Hun, 280; affd. on opinion below, 157 N. Y. 694; *Bagley v. Carthage, W. & S. H. R. R. Co.,* 165 N. Y. 179; *Gaul v. Kiel & Arthe Co.,* 199 N. Y. 472, 476.) The foregoing cases show that a distinction cannot be made because of the size or character of the defendant."

YOUNG vs. U. S. MORTG. & TRUST CO., 214 N. Y. 279.

"The common law rule that a corporation has no capacity to act, or to make a contract, except under its common seal, has been long since exploded in this country. Even in England, it has been found to be impracticable, so that the classes of cases which constitute exceptions to the rule have become so numerous that the exceptions have almost abrogated the rule. In the United States nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by a corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts. 'If this were not so,' says Mr. Chief Justice Redfield, 'it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks and similar corporations in this country, is without any formal meeting or votes of the board. Hence, there follows a necessity of giving effect to the acts of such corporations, according to the mode in which they choose to allow them to be transacted.' "

CROWLEY vs. GENESEE MINING CO., 55 *Cal.* 275-276.

STREETEN vs. ROBINSON, 102 *Cal.* 545-546.

NEWHALL vs. JOSEPH LEVEY BAG CO. 190 *Cal. App.* 25.

G. V. B. MINING CO. vs. FIRST NATIONAL BANK (*9th Cir.*) 36 *C. C. A.* 640, 95 *Fed.* 23.

An agreement made by an agent of a corporation is a contract of the corporation, althought made without any resolution of a board of directors, and although the seal used was the private seal of the agent, if the agent was authorized to execute it, or if the company ratified his act.

EUREKA CLOTHES WRINGING MACH. CO. vs. BAILEY W. & W. MACH. CO. 11 *Wall.* 488.

JACKSONVILLE, MAYPORT, PABLO R. & N. CO. vs. HOOPER, 160 *U. S.* 514, 521-522.

Employment of the defendant in error by the President of the Company, known to some of the directors of the company, and not repudiated, makes the contract that of the company. The passage of any resolution was not required.

SCOTT vs. S. S. OIL CO., 144 *Cal.* 140.

Plaintiff in error had knowledge of the employment of defendant in error before and during the performance of the work.

If full knowledge by the corporation was necessary, "it must be presumed that the corporation had full notice of all the facts which were known to its

President. The president of a corporation is a proper person to whom notice, which is to affect a corporation, is to be given. The corporation has no eyes, ears or understanding, save through its agents. The President is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so. Usually this is a conclusive presumption."

BALFOUR vs. FRESNO CANAL & IRRIGATION CO. 123 Cal. 397.

"Notice to the corporation agents who have authority to represent the whole Company is notice to the corporation."

BLOOD vs. LA SERENA LAND & WATER CO. 134 Cal. 370.

In the case just cited the action was to foreclose a mortgage executed on behalf of defendant by its president and secretary. No resolution authorizing the mortgage had been passed. It was claimed by defendant that the agent who represented the plaintiff in the sale of the land to the defendant had acted as its agent in the transaction without knowledge of the fact that he was plaintiff's' agent. It was held however that if the president and secretary of the defendant had knowledge, such knowledge was the knowledge of the corporation defendant.

RATIFICATION.

That The Quicksilver Mining Company ratified the acts of its President and of its General Manager with reference to the electric railroad and the power company cannot be denied.

The facts upon this subject have been fully set forth heretofore.

The fact that Anderson's work had been completed at the time the ratifying resolutions were passed by the stockholders of the Quicksilver Mining Company, simply adds to the effect and strength of the resolution as a ratification. The resolution is an approval of all of the acts of the president in reference to the power company and the railroad, and necessarily includes the work done by Anderson, and the expenditures made by him. That Anderson was not aware of the passing of the resolution is entirely immaterial, for the only question is as to what the Company did.

It appears that the Mining Company paid practically all of the expenses connected with both the railroad and power company, except the Anderson bill, and, there is no pretense that this bill stood on any different footing from the other bills, or that there was any justification for the refusal to pay this bill while making payment of the other bills.

The Mining Company accepted the benefits and fruits of Anderson's labor and expenditures which constitutes ratification. The Company accepted all

the stock of the electric road and the power company. It could not accept the benefits and repudiate the burdens.

"A ratification can be made * * * where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

CIVIL CODE SECTION 2310.

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

CIVIL CODE SECTION 1589.

"A ratification supposes a knowledge of the thing ratified, and, in the case of a contract, the inference from the ratification is that its provisions were known. When the ratification is proved, this inference necessarily follows and, if there was any mistake or misapprehension, that fact must be known. There is no evidence of any mistake in this case, and we cannot infer that the Board knew nothing of the contracts except through the medium of the report."

BIEN vs. BEAR RIVER & AUBURN W. & M. CO. 20 Cal. 613.

There is no merit in the claim of counsel that there was no ratification of the Company's employment of Mr. Anderson, because there is no evidence that the

ratification by the Company was with the knowledge of all of the facts and circumstances of Mr. Anderson's employment.

We have already directed the Court's attention to the principle of law laid down in Ballard vs. Nye, 138 Cal. 598, where the learned Justice quotes with approval MECHEM on AGENCY, 148, as follows:

"Ignorance of facts, however, can avail nothing where it (the ratification) is intentional and deliberate."

In addition to this, it has been shown that the President of the Company made reports stating generally what was being done by him, and that the Company approved of the acts of its President in reference thereto, and ordered bills incurred by its President in such work paid by the Company, and accepted all of the capital stock of the railroad company and the power company, and actually paid all of the bills incurred for the work, except Mr. Anderson's bill. It may be true that the President did not in his report give the name of each and every person who had performed work, but such fact is of no importance and is entirely immaterial. The essential point is that the Company's Board of Directors, knowing that its President had made contracts regarding the making of the necessary surveys and the laying out of the electric road, and the obtaining of the necessary rights of way, ratified the acts of the President. The presumption is that the Board of Directors, in ratifying the acts of the President possessed full knowledge of what it was doing.

ULTRA VIRES.

This subject was treated by MR. JUSTICE BLEDSOE in his opinion in this case as follows:

"The claim is made and has been given careful consideration that the doctrine of *ultra vires* as applied to corporate activities is applicable here, and that it, in itself, will suffice to deny plaintiff a recovery. Assuming that the doctrine is applicable at all, still I am in thorough sympathy with the proposition that it has no efficacy in this case, because of the fact that the contract solemnly and deliberately entered into by defendant through its authorized agent, has been fully performed by the plaintiff on his part. It would now be in the highest degree unjust to permit defendant to reap the benefit of whatever advantages may have accrued from the performance of the contract by the plaintiff and then deny to the plaintiff the compensation agreed to be paid, because of the claim indulged in that the corporation had no ~~power~~ power to enter into the contract at all. This conclusion, I think, is sustained by the language and holding of the Supreme Court of the United States. Eastern B. & L. Association vs. Williams, 189 U. S. 122.

"I do not feel, however, that the doctrine of *ultra vires* is necessarily involved. Plaintiff was not employed to build or operate a railway or to build or operate a power or water plant. He was merely employed to secure options looking to the development of a water supply and water right already on the

property of the defendant, and to secure rights of way by deed or otherwise for a railway, leading from defendant's property to the city of San Jose, and the operation of which, both as to carriage of freight and passengers, would presumably and probably directly aid and benefit defendant's property and defendant's business. New corporations were in fact organized, which said corporations were to conduct these respective businesses; but plaintiff was employed, and he rendered his services not in the organization or the conduct or control of such new corporations and new businesses, but in the taking of certain preliminary steps looking to the transaction of these new businesses when the proper and adequate machinery had been provided. In so far as the inceptive features were concerned, however, these preliminary steps had to be taken, and in my judgment were properly taken by the defendant itself, because of the fact that its property and its business was thereby to be benefited. Under the circumstances, therefore, the taking of these necessary preliminary steps was within the competency and the power of defendant corporation, and the plea of *ultra vires* is not sustained. Brown vs. Winnisimmet, 11 Allen, 326; Fort Worth Civic Company vs. Smith Bridge Company, 151 U. S. 294." (50-51).

The "water rights" in the Almaden Creek was the property of The Quicksilver Mining Company. Can it be successfully contended that, under the corpor-

ation's charter, it could not improve—perfect and market this very valuable asset?

If it were essential, advantageous or economical for the Company to secure better, more efficient and cheaper transportation, resulting in a saving to the Company over the outlay—can it be successfully claimed that the charter of the corporation would preclude the construction of a modern electric road? The means of transportation has changed with the progress of time. In the earlier days this same corporation was as antiquated as were the old Mexicans, and used burros for transporting its ore. The charter of this corporation does not inhibit it from keeping abreast with the march of progress and competition. Its counsel would force it to keep the burros.

The great fault of counsel's argument is due to the fact that he cannot realize that the enterprises undertaken were a part of the business of his corporation. If the enterprises were distant and disconnected with the properties of the corporation, counsel's argument might carry some weight.

We wish to call attention to the significant fact, that three other lawyers connected with his Company and with all the projects involved,—did not concur with counsel's views on this subject. At a meeting of the Board of Directors in New York on June 5th, 1911, the President was authorized to have a Mr. Aaron, the Company's New York Counsel, prepare

resolutions in reference to the first Power corporation. (238). We find no expression from him that the doctrine of *ultra vires* applied. Mr. Swayne, a lawyer of New York, and the Director who testified that the Senonac Power Company was a subsidiary Company to The Quicksilver Mining Company, never uttered a syllable about *ultra vires.* D. M. Burnett, Esq., the local counsel for the Company, was an organizer and director of each of the two subsidiary companies. He must have been of an opinion contrary to that of counsel.

"We know of no rule or principle by which an act creating a corporation for a certain specific object, or to carry on a certain trade or business is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of corporations which properly appertain to the general purposes for which its charter was granted,but it may also enter into and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."

BROWN vs. WINNISIMMET CO. 11 ALLEN 326.

JACKSONVILLE, MAYPORT, PABLO R. & N. CO. vs. HOOPER 160 U. S. 514, 525-526.

"Whether a contract is essential to the transaction of its ordinary affairs or for the purposes of the corporation is to be determined by the corporation or those to whom the management of its affairs are intrusted. If it is within the apparent scope of the organization the fact that the contract has been entered into by it or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect."

BATES vs. CORONADO BEACH CO. 109 Cal. 160, 163.

"A corporation created for the purpose of dealing in land, and to which the powers to purchase, to subdivide, and to sell, and to make any contract essential to the transaction of its business has been granted, possesses the incidental power to incur liability for building a bridge upon a public street, across a river, to secure better facilities for transit to and from the lots of lands which it is its business to acquire and dispose of."

FT. WORTH CITY CO. vs. SMITH BRIDGE CO., 151 U. S. 294.

In VANDALL vs. SOUTH SAN FRANCISCO DOCK CO., 40 Cal. 83, the defendant was incorporated under the laws of the State of California "to buy, improve, lease, sell, and otherwise dispose of real estate," in and near South San Francisco. The defendant purchased a tract of land in the vicinity of South San Francisco, and entered into an agreement with another corporation, which was engaged in constructing a railroad from the City of San Francisco proper to the vicinity of the defendant's property, by which agreement the railroad company bound itself to increase the width of its road and the frequency of the trips of its cars over it, and to reduce the price of passage over it about fifty per cent, and to maintain those conditions for a period of ten years, and the defendant agreed to pay the railroad company as a consideration for such concessions the sum of $20,000.00. The action in question was brought by the stockholders of the defendant corporation to enjoin the sale of their stock under assessments levied by the defendant for the purpose of raising money to pay the agreed amount to the railroad company. The plaintiffs insisted that under its act of incorporation the defendant had no power to expend the money of the corporation for such purpose, and that, therefore the assessment was void. The defendant, on the other hand, contended that under the authority given it by its certificate of incorporation to improve its property, it had the right to do every act, the direct and immediate tendency of

which was to benefit or enhance the value of its property, and that the agreement in question did improve the value of its property. Held that the agreement in question was within the incidental powers of the defendant corporation and that therefore the assessments were valid.

In TEMPLE STREET CABLE RY. vs. HELLMAN, 103 Cal. 634, it was held that a street railway corporation has power to execute a promissory note to the conductor of a baseball park in consideration that he would discontinue his former place of business and establish a baseball park on a tract of land adjacent to the land of the street railway with a view to increase the business of the street railway.

ESTOPPAL.

The company, having accepted the benefits of all of the work done in regard to the railroad and power concerns, and particularly the benefit of the work done by Anderson and of the expenditures made by him and, having taken to itself the capital stock of the railroad company, and of the power company, and, having recognized its liability for the work in question by paying, mostly, directly through its New York office, all of the expenses connected therewith, except the account of Anderson, which is of the same character as the other claims paid by it, the company cannot now be heard to raise the question of *Ultra Vires.*

"It is well settled in relation to contracts of corporations that where the question is one of capacity or authority to contract arising whether on the question of regularity of organization or of power conferred by the charter, the party who has had the benefit of the contract cannot be permitted, in an action founded upon it to question its validity. 'It would be in the highest degree inequitable and unjust' says Mr. Sedgwick, 'to permit the defendant to repudiate a contract, the fruits of which he retains.' "

ARGENTI vs. CITY OF SAN FRANCISCO,
16 Cal. 255, 264-265.

A corporation is liable on its promissory note, the consideration of which it has received and retained, although the note was executed in pursuance of a contract Ultra Vires.

MAIN vs. CASSERLY, 67 Cal. 127.

"The law of the subject is thus expressed in Bradley vs. Bradley, 53 Ill. 413; 'While a contract remains executory, the powers of corporations cannot be extended beyond their charter limits for the purpose of enforcing it. Not only so, but on application of a stockholder or of any other person authorized to make the application, a Court of chancery would interfere and forbid the execution of a contract Ultra Vires. But if one of the contracting parties proceeds in the performance of the contract, expending his money and his labor in the production of value, which

the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power. In cases of such character, courts simply say to corporations, You cannot, in this case, raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing, have placed in your corporate treasury the fruits of others labors, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter.' "

In BLOOD vs. LA SERENA L. & W. CO., 134 Cal. 361, 367, it was said: "Assuming that the contract of purchase was Ultra Vires, the law does not allow a corporation to retain the benefits which it has received from the contract and escape liability upon it."

In MAGEE vs. PACIFIC IMPROVEMENT CO., 98 Cal., 678, 681, it was said: "The proposition of the defendant that because inkeeping is not enumerated as one of the objects of its incorporation, its acts as an inkeeper are Ultra Vires, and cannot form the basis of any liability therefor, cannot be maintained. Having engaged in that occupation, the defendant cannot now repudiate its obligation upon the ground that under its corporate powers it was not authorized to engage in such occupation."

In PAULY vs. PAULY, 107 Cal. 8, 19, it was held that a corporation must account to a contractor for

the benefits received under an Ultra Vires contract.

In McQUAIDE vs. ENTERPRISE BREWING CO., 14 Cal. App. 319, it was said: "The doctrine of Ultra Vires, when invoked by a stockholder of a corporation, or in quo warranto proceedings by the State, particularly as to executory contracts, and in violation of its charter, or entirely outside the scope and purpose of its creation, is looked upon quite differently than it is when relied upon by a corporation as a shield to escape its just liability under an executed contract. In such cases the courts simply consider the facts as to the circumstances of the contract, as to whether or not the corporation has received benefits under it; as to whether or not the doctrine of estoppal in pais may be invoked. Such defense introduced against a contract which has been executed wholly or in part by the corporation, is looked upon with disfavor, and particularly of late years when corporations have multiplied until they control and operate all kinds of business, and in many cases, to the exclusion of individuals. The rule is based upon the strongest principles of justice and public policy, that a contract shall be enforced against a corporation when it has received the consideration or the benefits of the contract."

The same doctrine is held in the State of New York.

WHITNEY ARMS CO. vs. BARLOW, 63 N. Y. 63, 70.

LEINKAUF vs. LOMBARD, 137 N. Y. 418, 423.

HOLMES vs. EASTERN BUILDING & LOAN ASSN., 172 N. Y. 508.

The policy of the United States courts is also against the claim of ultra vires.

"The doctrine of *ultra vires,* whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided."

SAN ANTONIO vs. MEHAFFY, 96 U. S. 312, 315.

OHIO & MISS. RY. CO. vs. McCARTHY, 96 U. S. 258, 267.

The doctrine of ultra vires is not usually applied when the party setting it up has received a benefit from the unempowered and unlawful act relied on as a defense.

UNION GOLD MINING CO. vs. ROCKY MOUNTAIN NATIONAL BANK, 96 U. S. 640.

In a case where parties, who were about to organize a corporation, but had not yet filed its articles of incorporation, as required by statute, so that the corporation had no power to transact business, ordered and received goods, it was held that: "The corpora-

tion having assumed, by entering the contract with plaintiff, to have the requisite power, both parties are estopped to deny it."

WHITNEY vs. WYMAN, 101 U. S. 392, 397.

In Eastern Building & Loan Association vs. Williams, 189 U. S. 122, 129, the Court quotes with approval from an opinion of the New York Court of Appeals: "We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involve no moral turpitude, and do not offend any express statute, they are not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance, and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. While they have no right to violate their charter, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that, while a contract remains unexecuted upon both sides,

a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced yet when it becomes executed by the other party it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power.''

American National Bank vs. National Wall Paper Co., 23 C. C. A. 33, 77 Fed. 85.

In U. S. Savings & Loan Co. vs. Convent of St. Rose, 66 C. C. A. 416, 418-419, 133 Fed. 354, it was said by the Circuit Court of Appeal for this circuit, speaking of the claim by the defendant that the contract was beyond its powers to make and, therefore, *ultra vires,* ''Appellee has received the fruits and benefits of the contract, but has not paid all of the money agreed to be paid thereon by the terms of the written contract. Can it now successfully defeat the contract by the plea of ultra vires? It must be remembered that we are called upon to deal directly with the rule as applied to private corporations, where the contract has been fully executed by the party against whom the plea of *ultra vires* is in effect as distinguished by the rule which is applied to cases of executory contracts or contracts made by public or *quasi* public corporations, which owe corporate duties to the public. The general rule applicable to the case in line is expressed in 5 Thompson on Corporations, Sec. 6016, as follows: 'The great

mass of judicial authorities seems to be to the effect that where a private corporation has entered into a contract in excess of its corporate powers, and has received the fruits and benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."

The facts of record in this case, and the law applicable thereto, uphold and sustain the position of the trial Court and every expression contained in the learned Judge's opinion; and a contrary conclusion would result in the defeat of a just and legal cause. Confident that we have overcome every argument of counsel for plaintiff in error, and have shown that there is no merit in the defense made by the Company against Mr. Anderson's claim for his services and moneys expended, we feel, however, that it may be advisable to discuss certain minor matters found in the brief for plaintiff in error. We do not desire to be charged with having passed them because of an inability to respond to them.

Counsel stated that it is conceded by us that there was no express authority conferred upon Nones by the mining company to employ Anderson for any purpose, nor was the employment of Anderson ever authorized or ratified by the mining company. We emphatically deny that we ever at any time made such a concession, and we assert that the record shows to the contrary. We do not say that by any

resolution entered upon the minutes of the Company, or by any vote taken by the Board of Directors, that Mr. Anderson was expressly employed by the mining company. The mining company did not pass a resolution by its Board of Directors, nor did it enter any such resolution upon its minutes, whereby it employed Civil Engineer Hermann to survey the right of way for the proposed railroad, or whereby it employed the firm of Smith, Emory & Company to survey and make maps and plans for the erection of the dam with reference to the power company, nor whereby it employed laborers and foremen of laborers to cut down grades along the line of the proposed railroad. It was not necessary that the employment of Mr. Anderson, or any of these other men, should be by vote of the Board of Directors and entered as a resolution upon the minutes. I am strongly of the belief that learned counsel will not be able to find any endorsement upon the minutes, or any action of the Board of Directors showing the appointment of Tatham as general manager. Tatham, nevertheless, was general manager, and acted as such during all this long period of time.

It is not true that we concede, or ever conceded, that the employment of Anderson was not authorized or was not ratified. We have shown clearly that the employment was authorized, and not only was it authorized, but it was ratified. It was authorized expressly by all of the Directors residing in the State

of California; it was authorized ostensibly and impliedly by all of the Directors and Stockholders; it was ratified by all of the Directors and Stockholders.

What process of reasoning does the learned counsel for plaintiff in error, hope to adopt by which he expects to convince a fair mind that the taking over of all of the stock of an organized corporation is not the receipt of something of value? The perfection of the mining company's water rights, so that the same were salable, necessarily demanded that there be no infringement upon the rights of adjoining property owners; and the guarding against such a contingency was a necessity before the stock of the water company owned by the plaintiff in error would have been marketable.

When the plaintiff in error took over the stock of the railroad company it acquired a property of considerable value, and this due entirely to the efforts and expenditures of Mr. Anderson. It is a matter of common knowledge that rights of way and a public franchise for an electric road, through such a community as has been described, are acquired only after the expenditure of much time, money and the continuous and persistent services of competent and efficient employees. All of these rights acquired by the mining company, upon becoming the owner of the stock of the Railroad Company ought reasonably to have been of a marketable value of several thousands of dollars. The value of both of these enterprises

was contributed to and produced to a great extent by Mr. Anderson. It seems a falacious argument to contend under these circumstances that plaintiff in error did not receive the benefits of the services rendered. If the mining company did not see fit to preserve these assets, if they did not develop them, or if disaffection among the stockholders obstructed the sale, it is no fault of Mr. Anderson.

Criticism seems to be made of defendant in error because he was not crowding for his claim upon the completion of the services. Mr. Anderson had full faith in the declarations of the President and the General Manager of the Company, as well as in the Attorney for the Company, all three of whom were Directors. He was informed that the stock of the Water Company was to be sold, and he would then get his money. He was told by Nones that the rails, ties and fish plates had been bought for the Railroad, and that when the road was built he would get his money. Having confidence in Nones, he naturally waited, expecting that within a reasonable time the sale would be consummated, and that the road would be built. We were lulled into a state of confidence by the actions of plaintiff in error, and because of this fact, we are now criticized by plaintiff in error for the position that it put us in. That it was perfectly proper to present a claim to Tatham, the General Manager, is very apparent. Tatham says: "I did not send it (Anderson's bill) to New York because I usually paid bills from this end." (126).

We are again criticized by counsel for the mining company because the mining company's general manager was guilty of a direlection in the eyes of counsel.

It is charged that when Mr. Anderson took a trip to Randsburg, in the southern part of the state of California, to procure an option with reference to the water rights, that he took the option in the name of C. P. Anderson & Co. This is only conclusive evidence of the fact that he was obeying the directions given by Nones, and no other inference can be drawn therefrom. Quoting from the testimony we find the following: "Nones didn't want any one to know the purpose of the options until the deal had been consumated." (54).

When Nones was selling a portion of the lands belonging to the Company, the fact that he engaged Anderson as a broker, and the fact that Anderson received commissions for selling these lands, has no connection with the present controversy. The fact that at the time the various sales of these lands were consummated, the Board of Directors furnished resolutions authorizing the sales accompanying the deeds, which resolutions were criticized or passed upon by the attorneys for the purchasers, could not possibly have had any significance to Mr. Anderson, or to any one else, with regard to his employment in the matters at issue. All real estate brokers are familiar with the fact that such resolutions are uniformly required when conveyances of real estate are made from corporations. This fact would have no

sifnificance to any one engaged to render services in procuring franchises, options and rights of way.

Counsel says—how explain the written promise of Nones to pay Anderson $4500 for services in the railroad matter? As heretofore stated, this instrument was handed to Mr. Anderson in the office of the attorney for the Mining Company in the handwriting of Mr. Tatham, the General Manager of the Company, and signed by Nones, its President. Considering the relationship between all of the parties, it was very natural that Mr. Anderson should have received it from them with the full belief that it was the intent and purpose of the parties that this should be paid by them as the representatives of The Quicksilver Mining Company.'' Nones testified that this was merely his guarantee to Mr. Anderson for Anderson's ''services for The Quicksilver Mining Company.'' (210).

The declaration made by counsel that the evidence disclosed that no benefits were received by plaintiff in error, but that it suffered actual loss, in the correct sense, is an absolutely erroneous statement. When the corporation acquired the fruits of Anderson's labor, it received the benefits, and it then possessed properties of value; that it subsequently neglected these properties; that it squandered its opportunities, does not render us responsible for its improvidence.

The president was authorized by the mining company to sell the stock and securities of the Senonac

Power Company *"at a price of not less"* than $200,000 in cash or its equivalent, (249), instead of *for the sum of* $200,000 as stated by counsel. Because of the fact that Nones was negotiating the sale for the sum of $325,000, which would have accrued to the bentfit of the mining company, counsel for plaintiff in error in his brief at page 51 is desperate enough to go out of the record and make the declaration, that Anderson and Nones together would have unlawfully appropriated this $125,000 to their own use, had Nones been successful in selling the property of the corporation of which he was president. How counsel can justify himself in making this charge against Mr. Anderson is more than we can comprehend. The sale was being negotiated by Smith, Emory & Company, who are well known and respon-
~~repute. Mr. Anderson had absolutely no connection~~
sible brokers and engineers of San Francisco of high standing and repute. Mr. Anderson had absolutely no connection with any negotiations or prospective sale of the stock of the Senonac Power Company. Learned counsel has personal knowledge of the unimpeachable character and strict integrity of the gentlemen he thus charges without warrant with these corrupt motives.

In closing this brief, we desire to record the expression that the opinion rendered by the learned trial judge is a just and righteous interpretation of the facts and construction of the law. The conten-

tions and claims of plaintiff in error in this whole litigation are without merit, and the appeal is unwarranted.

With full confidence that the judgment of the trial Court will be sustained our cause is respectfully submitted.

B. A. HERRINGTON

Attorney for Defendant in Error.

Dated: May 24th, 1917.